

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

DOWNING PROPERTIES	:	
ASSOCIATES,	:	
	:	
PLAINTIFF,	:	Civil Action
	:	
V.	:	No. 98-CV-506
	:	
McDONALDS CORPORATION AND	:	
FRANCHISE REALTY INTERSTATE	:	
CORPORATION,	:	
DEFENDANTS.	:	
	:	

MEMORANDUM OF DECISION

McGlynn, J.

June , 1998

Plaintiff Downing Properties Associates ("Plaintiff") brought this action against Defendants McDonald's Corporation ("McDonald's") and Franchise Realty Interstate Corporation ("FRIC") ("collectively Defendants"), claiming breach of contract, unjust enrichment, fraud and seeking ejectment of McDonald's from its current premises. Before the court is Defendants' Motion to Dismiss or in the Alternative for Summary Judgment and Plaintiff's Cross-Motion for Partial Summary Judgment as to Count IV (Ejectment). For the following reasons, Defendants' motion will be granted in part and denied in part and Plaintiff's motion will be denied.

I. Factual Background

Plaintiff is the owner of real property located in Downingtown, Pennsylvania. Compl. ¶ 10.¹ Pursuant to a lease

¹ Plaintiff is the successor in interest of Downing Center Associates, the original lessor of the property. Compl. ¶ 1.

agreement ("Lease") dated June 28, 1977, FRIC leased a portion of the property from Downing Center Associates with the intention of constructing a McDonald's restaurant on the premises. Id. ¶ 7. The term of the Lease was for twenty years, commencing August 16, 1977. Id. ¶ 8. The Lease also included an option to extend the Lease an additional five (5) years provided that McDonald's gave written notice of its intention to exercise this provision at least ninety (90) days prior to the Lease's expiration. Id. According to Plaintiff, the Lease expired on August 16, 1997, twenty years after the commencement date. Pl's Response to Dfs' Mot. to Dismiss or Sum. Judgmt. and Pl's Cross Motion, at unnumbered 2. Defendants, however, claim the Lease will not expire until January 1, 1999, twenty years after January 2, 1979, the date McDonald's opened for business to the public. Dfs' Mem. of Law in Support of Dfs' Mot. to Dismiss or, in The Alt., For Sum. Judgmt., at 3.

In April of 1988, Plaintiff purchased the assets of Downing Center Associates, thereby acquiring all rights under the Lease. Compl. ¶ 10. Sometime between June 28, 1977 and January 1, 1988, McDonald's acquired all assets of FRIC. Id. ¶ 11.

Since Plaintiff entered the Lease in 1988, McDonald's has reimbursed Plaintiff \$325 per month (\$3900 per year) as its pro rata share of the common are maintenance costs ("CAM reimbursement"). Id. ¶ 16. In October of 1997, Plaintiff determined that an additional sum totaling \$124,424.74 should have been paid by McDonald's as its share of the CAM costs for

the years 1988 through 1996. Id. ¶¶ 22-24. Plaintiff alleges that McDonald's fraudulently concealed this obligation despite knowledge to the contrary. Id. ¶¶ 21, 44.

On October 27, 1997, McDonald's notified Plaintiff of its intent to exercise the Lease option. Id. ¶ 26. In its response dated November 3, 1997, Plaintiff asserted that the Lease had already expired. Pl's Response to Dfs' Mot. to Dismiss or Sum. Judgmt. and Pl's Cross Motion, at Exh. D. On January 19, 1998, Plaintiff mailed the Defendants a "Notice to Quit" in an attempt to evict McDonald's from the premises. Id. ¶¶ 27, 28. McDonald's, however, refused to vacate the premises. On January 30, 1998, Plaintiff initiated this suit.²

II. Discussion

A. Standard of Review

When deciding a motion based on Fed. R. Civ. P. 12(b)(6), the court must accept as true the factual allegations in the complaint and draw all reasonable inferences in favor of the plaintiff. Alexander v. Whitman, 114 F.3d 1392, 1397-98 (3d Cir.), cert. denied, 118 S. Ct. 367 (1997). In doing so, "a court may properly refer to the factual allegations contained in the complaint, exhibits attached thereto, documents referenced therein, matters of public record, and undisputedly authentic

² Plaintiff filed a Certificate of No Response, dated April 21, 1998, claiming no objections to Plaintiff's Cross-Motion for Partial Summary Judgment as to Count IV (Ejectment) were filed with the court. Defendants, however, properly filed their answer to Plaintiff's motion on April 20, 1998.

documents attached as exhibits to the defendant's motion to dismiss if the plaintiffs' claims are based on those documents." Pension Benefit Guaranty Corp. v. White Consolidated Indus., Inc., 998 F.2d 1192, 1196 (3d Cir. 1993), cert. denied, 510 U.S. 1042 (1994); Wallace v. Systems & Computer Tech. Corp., No. 95-CV-6303, 1997 WL 602808, at *5 (E.D. Pa. Sept. 23, 1997). If the court considers any additional documents, it must convert the motion to dismiss into a summary judgment motion and give the opposing parties notice and opportunity to address these extraneous materials. Fed. R. Civ. P. 12(b).

Here, Defendants have attached numerous exhibits to their memorandum of law supporting their motion to dismiss. Exhibit A contains Plaintiff's Complaint, including all the exhibits appended to the Complaint, i.e., the Lease, Lease Supplement, CAM statements, and correspondence between Plaintiff and McDonald's regarding the option to extend the Lease and CAM reimbursement expenses. Exhibit B contains a letter from McDonald's to Plaintiff, dated May 16, 1988, memorializing a Lease expiration date of January 1, 1999. Exhibit C is a Lessee's Certificate, dated December 19, 1994, executed by McDonald's which also memorializes a Lease expiration date of January 1, 1999. Plaintiff's Complaint is "based" on these documents and consequently, Plaintiff cannot dispute their authenticity. Accordingly, the court may consider them part of the pleadings for the purposes of a motion to dismiss for failure to state a claim under Rule 12(b)(6), without transforming Defendants'

motion into a motion for summary judgment under Rule 56(c).

B. Count I: Breach of Contract

The heart of Plaintiff's breach of contract action is McDonald's failure to reimburse Plaintiff for its share of the common area maintenance costs ("CAM") over and above McDonald's monthly contribution of \$325. Compl. ¶ 13. Defendants do not deny that its share of the CAM costs may have been underpaid during the years 1988 to 1996, but they contend that Plaintiff did not notify Defendants of the correct amounts as Plaintiff was required to do by the terms of the Lease. Defendants also request dismissal of the claims on statute of limitations grounds for the years 1988 to 1992.

1. The CAM Reimbursement Claims

The parties agreed that McDonald's would make payments of \$325 per month toward the costs of common area maintenance with the understanding that:

Within ninety (90) days after the end of each twelve-month period, Lessor shall deliver to Lessee a statement of Lessor's "operating costs" for such twelve-month period, and the monthly installments paid or payable shall be adjusted between Lessor and Lessee, each party hereby agreeing to pay to the other, within thirty (30) days of receipt of such statement, such amounts as may be necessary to effect adjustment to the agreed proportionate share for the preceding twelve calendar month period.

Lease, Addendum B, ¶ 39. The annual statements provided by Plaintiff to Defendants show that there was no balance due for the CAM costs. The plain language of Paragraph 39 creates a duty

on the part of Plaintiff to accurately inform Defendants of the operating costs owed and on the part of Defendants to reimburse Plaintiff for those specific costs. If Plaintiff's statements were incorrect, the inaccuracies were not based on any acts or omissions by Defendants. The Lease does not impose a duty on the Defendants to independently determine the CAM expenses. Indeed, the annual statements provided by Plaintiff to Defendants in accordance with Paragraph 39 unequivocally show that no additional funds were required. Plaintiff cannot demonstrate that Defendants breached a duty established by the Lease. Defendants' Motion to Dismiss Count I will be granted.³

B. Count II: Unjust Enrichment Claim

In Count II, Plaintiff contends that Defendants will be unjustly enriched if permitted to retain the CAM services without being required to pay the balance of the pro-rata share owed. Compl. ¶ 41.

To sustain a claim for unjust enrichment under Pennsylvania law, "the claimant must show that the party against whom recovery is sought either wrongfully secured or passively received a benefit that would be unconscionable for the party to retain without compensating the provider." Hershey Foods Corp. v. Ralph Chapek, Inc., 828 F.2d 989, 999 (3d Cir. 1987). Specifically, Pennsylvania law mandates that, "the quasi-contractual doctrine

³ It is also clear that Plaintiff's claims for additional CAM payments for the years 1988 through 1992 are barred by the statute of limitations. 42 Pa. Cons. Stat. Ann. § 5525(8) (1998).

of unjust enrichment [is] inapplicable when the relationship between the parties is founded on a written agreement or express contract." Id. (citing Benefit Trust Life Ins. Co. v. Union Nat. Bank of Pittsburgh, 776 F.2d 1174 (3d Cir. 1985)).

Because Plaintiff's unjust enrichment claim is premised on the written Lease and the parties' relationship is founded on the Lease, the doctrine of unjust enrichment is inapplicable. Therefore, Count II will be dismissed for failure to state a claim upon which relief may be granted.

C. Count III: Fraud

Plaintiff's fraud allegations fall woefully short of the requirements of Fed. R. Civ. P. 9(b). This is understandable since Plaintiff has undertaken the seemingly impossible task of trying to construct a fraud case out of the failure of Defendants to disclose information that was almost exclusively within the control of the Plaintiff, i.e., what Plaintiff's annual common area maintenance costs were and what Defendants' proportionate share of those costs were. Indeed, it was Plaintiff's contractual obligation to provide this information to Defendants—not the other way around. Simply stated, Defendants cannot be charged with fraud on the basis that they failed to disclose information which must be gathered from Plaintiff's own books and records. Accordingly, Count III will be dismissed.

D. Count IV: Ejectment

Finally, Defendants request dismissal of Count IV, claiming: (1) Plaintiff did not provide McDonald's with the appropriate

time to cure as required under 68 Pa. Stat. § 250.501, and (2) McDonald's timely exercised its option to renew. Dfs' Mot. to Dismiss or in the Alt. For Sum. Judgmt, at 6. Plaintiff, on the other hand, requests that partial summary judgment be granted in its favor.

1. Standard of Review

A motion for summary judgment may be granted only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). An issue of fact is "genuine" if the evidence is such that a reasonable jury could return a verdict for the non-moving party in light of the burdens of proof imposed by the substantive law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The party moving for summary judgment has the initial burden of presenting specific evidence demonstrating the absence of a material factual dispute. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986), cert. denied, 484 U.S. 1066 (1988).

2. Lease Expiration

It is undisputed that the Lease commenced on August 16, 1977. Pl's Response to Dfs' Mot. to Dismiss or Sum. Judgmt. and Pl's Cross Motion, at Exh. A; Dfs' Mem. of Law in Opp'n to Pl's Cross-Mot. For Partial Sum. Judgmt., at 3. At issue here is whether this commencement date triggered the twenty year Lease

period. According to Plaintiff, the Lease expired twenty years from August 16, 1977, or by August 15, 1997. Defendants, on the other hand, calculate the term of the Lease not from the Lease commencement date, but rather from the date McDonald's opened for business to the public. Since McDonald's opened for business to the public on January 2, 1979, Defendants assert that the Lease will not expire until January 1, 1999 and therefore, Plaintiff cannot eject McDonald's from the property.⁴

The Lease provision in question states:

Lessee shall have and hold the demised premises for a term commencing on the date of last execution hereof and ending twenty (20) years from the date upon which said McDonald's restaurant is open for business to the public. When the term hereof is ascertainable and specifically fixed, or otherwise agreed to by Lessor and Lessee, Lessor and Lessee shall enter into a supplement, suitable for recording, which shall specify the actual date for the expiration of the original term of this Lease and for commencement of accrual of rent payable hereunder by Lessee.

Lease, ¶ 3, dated June 28, 1977. On September 19, 1978, Downing Center Associates (the original Lessor) and FRIC executed and recorded a document titled "Lease Supplement." Pl's Response to Dfs' Mot. to Dismiss or Sum. Judgmt. and Pl's Cross Motion, at

⁴ Notably, McDonald's entered into a "Lessee's Certificate" which stated: "[t]he term of the Lease commenced on or before August 16, 1977 and continues through at least January 1, 1999" Pl's Memo. of Law in Response to Dfs' Motion, at Exh. B, ¶ 3. This document, however, was only signed by representatives of McDonald's, not Plaintiff, and therefore, its binding effect on the parties is questionable. See Lease, ¶ 23(c).

Exh. B. This document stated that it was executed to affirm the following facts:

1. Commencement date of the term of said Lease is August 16, 1977.
2. Commencement date of the rent and all monetary obligations of said Lease is July 10, 1978.

Id.

Where the words of a contract are clear and unambiguous, the intent of the parties is to be found in the express language of the contract. Marcinak v. Southeastern Greene Sch. Dist., 544 A.2d 1025, 1027 (Pa. Super. Ct. 1988). Determining whether a contract is ambiguous is a question of law. Hutchison v. Sunbeam Coal Corp., 519 A.2d 385, 390 (Pa. 1986). A contract is ambiguous if it is "reasonably susceptible to different constructions and capable of being understood in more than one sense." City of Erie, Pennsylvania v. Guaranty Natl. Ins. Co., 109 F.3d 156, 163 (3d Cir. 1997)(quoting Steele v. Statesman Ins. Co., 607 A.2d 742, 743 (Pa. 1992)).

In the present case, a plain reading of the Lease does not yield the clear intent of the parties. According to its plain language, the Lease to expire twenty years after McDonald's opened for business to the public or on another date mutually agreed upon and recorded by the parties. Plaintiff alleges that the Lease Supplement clarified the Lease term's commencement as August 16, 1977. However, a supplemental agreement was to "specify the actual date for the expiration of the original term of this Lease and for commencement of accrual of rent payable

hereunder by Lessee." Lease, Addendum B, ¶ 39. The Lease Supplement does not specify the expiration date. Defendants claim that Plaintiff was aware that McDonald's opened for business on January 2, 1979, as evidenced by: (1) correspondence dated May 16, 1988 from McDonald's to Plaintiff, memorializing a Lease expiration date of January 2, 1999; (2) Paragraph 3 of the Estoppel Certificate (which has not been attached to the pleadings); and Paragraph 3 of the Lessee's Certificate. Dfs' Mem. of Law in Support of Dfs' Mot. to Dismiss or, in The Alt., For Sum. Judgmt., at 16.

If the parties entered the Lease intending for it to expire on August 15, 1997, then ejectment of McDonald's from the premises is appropriate. Alternatively, if the Lease term commenced when McDonald's opened for business to the public, then the Lease has not expired and Plaintiff's ejectment action is premature. Consequently, on the present state of the record, there is a material dispute as to the termination date of the Lease and accordingly, summary judgment as to that issue is inappropriate.

An appropriate order follows.**IN THE UNITED STATES DISTRICT COURT**
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DOWNINGTOWN PROPERTIES
ASSOCIATES,

:
:
:

PLAINTIFF,	:	Civil No.
	:	98-CV-506
V.	:	
	:	
McDONALDS CORPORATION AND	:	
FRANCHISE REALTY INTERSTATE	:	
CORPORATION,	:	
DEFENDANTS.	:	
	:	
_____	:	

O R D E R

McGlynn, J. June , 1998

AND NOW, this day of JUNE, 1998, upon
 consideration of Defendants' Motion to Dismiss or in the
 Alternative for Summary Judgment and Plaintiff's Cross- Motion
 for Summary Judgment as to Count IV (Ejectment), it is hereby

O R D E R E D

1. That Defendants' Motion to Dismiss or in the
 Alternative for Summary Judgment with regard to Count IV is
DENIED and as to Counts I, II and III, the motion is **GRANTED**;

2. That Plaintiff's Motion for Partial Summary
 Judgment as Count IV (Ejectment) is **DENIED**.

BY THE COURT:

JOSEPH L. McGLYNN, JR. J.